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Fong Kong Meng & Anor v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 05(RJ)-4–11 OF 2018 (B)
DAVID WONG CJ (SABAH AND SARAWAK), ALIZATUL KHAIR, ZAWAWI SALLEH, ABANG ISKANDAR AND NALLINI PATHMANATHAN FCJJ
20 JUNE 2019

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Criminal Procedure — Conviction — Conviction on lesser charge — High Court convicted and sentenced accused to death for committing murder — Court of Appeal upheld verdict — Federal Court ('FC') ruled murder charge not proven and convicted accused of culpable homicide not amounting to murder under s 304(a) of the Penal Code and sentenced them to 20 years' jail — Accused sought to set aside FC's decision on ground they should have been convicted and sentenced under s 304(b) of the Penal Code — Accused argued that original murder charge did not allege they intended to cause victim's death but only that they knew their acts/omissions likely to cause death — Whether when FC found murder charge not proven the conviction on the lesser charge could not be for a death that was intentionally caused — Whether FC not shackled by findings of fact or deliberations made in courts below but entitled under s 86 of the Courts of Judicature Act 1964 to re-evaluate entire evidence to determine under which limb of s 299 of Penal Code the accused were guilty of — Whether on undertaking such exercise FC found that s 304(a) conviction and sentence appropriate one in circumstances of case

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The applicants, who were husband and wife, were sentenced to death by the High Court for causing their maid's death as a result of a long period of abuse, neglect and starvation. The autopsy report on the maid showed that her weight had dropped from 49kg to only 25kg as a result of the abuse; that there were multiple injuries on her body from being regularly beaten and that she had been denied food and medical treatment. Dissatisfied with the Court of Appeal's affirmation of their conviction and sentence, the applicants appealed further to the Federal Court ('FC'). The FC found that the charge of murder had not been made out and set aside the conviction and sentence and convicted the applicants for committing culpable homicide not amounting to murder under s 304(a) of the Penal Code ('the PC') and sentenced them to 20 years' jail. In their instant application for review of the decision under r 137 of the Rules of the Federal Court 1995, the applicants sought to set aside the s 304(a) conviction and sentence on the ground they should have been convicted and sentenced under s 304(b) of the PC instead. Section 304(a) carried a punishment of a maximum 30 years' jail plus a fine if the act which caused the

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death was done intentionally whereas s 304(b) carried a lighter punishment of a maximum ten years' jail or a fine or both if the act which caused the death was done with the knowledge that it was likely to cause death, but without the intention to cause death. The trial court had convicted the appellants on finding that the prosecution had proven its murder charge against them based on the 'type' of murder set out in s 300(d) of the PC, ie, 'if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid'. The applicants argued that since the prosecution's case against them was not on the basis that they had intended to cause the maid's death but only that they knew their acts and/or omissions were likely to cause death, when the FC panel that heard their appeal ruled that the s 300(d) murder charge had not been made out, it should have convicted them under s 304(b) of the PC (which spoke of knowledge) rather than s 304(a) (which spoke of intention).

Held, dismissing the review application:

(1) In criminal appeals, the Federal Court ('FC'), pursuant to s 86 of the Courts of Judicature Act 1964 ('the CJA'), had the same powers as the High Court and Court of Appeal and was duty-bound to evaluate all the facts in its totality and then determine whether the conviction of the accused was safe. If the conviction was unsafe, the court was duty-bound to determine whether the evaluated facts justified a conviction under another provision of the Penal Code ('the PC'), to wit, another criminal offence (see paras 18–19).

(2) The earlier panel of the FC, upon finding that s 300(d) of the PC had not been proven against the applicants, embarked on a process of re-evaluation of the facts and made a determination on which relevant provision of the PC the applicants were guilty of upon the application of the fresh finding on the facts (see para 20).

(3) When a court found that a s 300 offence (of murder) had not been made out, s 299 (culpable homicide) offences came into play for the court to determine, based on the facts found, under which limb of s 299 did the acts or omissions fall under. That was what the earlier panel of the FC did. They evaluated the evidence again under s 86 of the CJA to find guilt either under limb 1, 2 or 3 of s 299. Not only was the earlier FC panel fully entitled to re-evaluate the evidence afresh, but it had to do so because the ingredients in ss 299 and 300 of the PC varied in degree. While one resulted in culpable homicide, the other resulted in culpable homicide not amounting to murder. Different considerations applied to each offence. The court's mind had to focus on the totality of the evidence to determine under which limb of s 299 the accused were guilty of.

Whatever discussions that related to the ingredients of s 300(d) in the High Court and the Court of Appeal were no longer relevant for the process of determining guilt under s 299 of the PC for culpable homicide. The earlier FC panel eventually found that a s 304(a) conviction was an appropriate sentence. What the earlier panel did was perfectly in order and was something the FC was entitled to do in all criminal appeals brought before it (see paras 21–24).

(4) Even if the earlier FC panel had wrongly applied the facts to the law, that did not meet the threshold to order a review under r 137. The law was clear. Where a decision was challenged on its merits, whether on facts or law, or where there was a divergence of opinion arising from the application of a set of facts to a provision of the law, the FC would not exercise its power of revision. The power to review could only be exercised in limited circumstances (see para 25).

(5) The applicants were sentenced to 20 years jail instead of being given the death sentence. Considering their cruel treatment of their maid eventually led to her untimely and tragic death, any reasonable tribunal would have found the sentence to be appropriate as it reflected the seriousness of the offence. The applicants had had the benefit of being heard at three levels of the courts and had been legally represented all the way, hence it could not be said, in fairness, that there had been any miscarriage of justice (see para 27).

(6) The earlier FC panel did not commit any error. Rather, the error was with the applicants for seeing a nexus between ss 304 and 300 of the PC when, in fact, the true nexus was between ss 304 and 299. Section 304 had nothing to do with s 300 but everything to do with s 299. The language employed by the drafters in s 299 of the PC could not be clearer in terms of stipulating which offence it had been legislated to provide punishments for (see para 28).

(7) Every decision of the courts depended substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts. Even if the facts were the same, the FC was entitled to make a fresh finding of fact in a guilt-finding process. The FC was not bound by its own earlier decision, especially when the appeal related to finding of facts (see para 26).

[Bahasa Malaysia summary

Pemohon-pemohon, yang merupakan suami isteri, telah dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana menyebabkan kematian pembantu rumah mereka akibat tempoh lama penderaan, pengabaian dan kebuluran yang panjang. Laporan bedah siasat terhadap pembantu rumah menunjukkan bahawa berat badannya menurun daripada 49kg kepada hanya 25kg akibat penderaan; bahawa terdapat banyak kecederaan pada tubuhnya kerana kerap

dipukul dan bahawa dia telah dinafikan makanan dan rawatan perubatan. Berasa tidak puas hati dengan pengesahan Mahkamah Rayuan terhadap sabitan dan hukuman mereka, pemohon-pemohon telah merayu selanjutnya ke Mahkamah Persekutuan ('MP'). MP mendapati bahawa pertuduhan membunuh tidak dibuat dan telah mengetepikan sabitan dan hukuman dan mensabitkan pemohon-pemohon kerana melakukan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah s 304(a) Kanun Keseksaan ('KK') dan menjatuhkan hukuman penjara ke atas mereka selama 20 tahun. Dalam permohonan mereka ini untuk mengkaji semula keputusan di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995, pemohon-pemohon memohon untuk diketepikan s 304(a) sabitan dan hukuman atas alasan bahawa mereka sepatutnya disabitkan dan dijatuhkan hukuman di bawah s 304(b) KK sebaliknya. Seksyen 304(a) membawa hukuman penjara maksimum selama 30 tahun dan denda jika perbuatan yang menyebabkan kematian dilakukan dengan sengaja manakala s 304(b) membawa hukuman lebih ringan iaitu penjara maksimum selama sepuluh tahun atau denda atau kedua-duanya jika perbuatan yang menyebabkan kematian dilakukan dengan pengetahuan bahawa ia mungkin menyebabkan kematian, tetapi tanpa niat untuk menyebabkan kematian. Mahkamah perbicaraan telah mensabitkan perayu-perayu apabila mendapati pendakwaan telah membuktikan pertuduhan membunuh terhadap mereka berdasarkan 'type' pembunuhan yang dinyatakan dalam s 300(d) KK, iaitu, 'if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid'. Pemohon berhujah bahawa oleh kerana kes pendakwaan terhadap mereka tidak berasaskan bahawa mereka bertujuan untuk menyebabkan kematian pembantu rumah itu tetapi hanya mereka yang mengetahui perbuatan dan/atau peninggalan mereka mungkin menyebabkan kematian, apabila panel MP yang mendengar rayuan mereka memutuskan bahawa pertuduhan membunuh s 300(d) tidak dibuat, ia sepatutnya telah mensabitkan mereka di bawah s 304(b) KK (tentang pengetahuan) dan bukannya 304(a) (tentang niat).

Diputuskan, menolak permohonan kajian semula:

(1) Dalam rayuan jenayah, Mahkamah Persekutuan ('MP'), menurut s 86 Akta Mahkamah Kehakiman 1964 ('AMK'), mempunyai kuasa yang sama seperti Mahkamah Tinggi dan Mahkamah Rayuan dan terikat untuk menilai semua fakta secara keseluruhannya dan kemudian menentukan sama ada sabitan tertuduh adalah selamat. Sekiranya sabitan itu tidak selamat, mahkamah terikat untuk menentukan sama ada fakta-fakta yang dinilai itu mewajarkan suatu sabitan di bawah peruntukan lain Kanun Keseksaan ('KK'), iaitu satu lagi kesalahan jenayah (lihat perenggan 18–19).

(2) Panel MP sebelumnya, apabila mendapati bahawa s 300(d) KK tidak dibuktikan terhadap pemohon, telah memulakan proses penilaian semula fakta-fakta dan membuat penentuan berkaitan peruntukan KK pemohon bersalah atas permohonan penemuan baru mengenai fakta (lihat perenggan 20).

(3) Apabila mahkamah mendapati bahawa suatu kesalahan s 300 (membunuh) tidak dapat dibuktikan, kesalahan s 299 (membunuh tanpa niat) terpakai untuk mahkamah menentukan, berdasarkan fakta-fakta yang didapati, di bawah cabang s 299 yang mana meliputi perbuatan atau ketinggalan itu. Inilah yang dilakukan oleh panel MP sebelum ini. Mereka menilai bukti keterangan itu lagi di bawah s 86 AMK untuk mencari kebersalahan sama ada di bawah cabang 1, 2 atau 3 kepada s 299. Bukan hanya panel MP yang terdahulu berhak untuk menilai semula keterangan lagi, tetapi ia harus berbuat demikian kerana elemen-elemen dalam ss 299 dan 300 KK adalah berbeza mengikut tahap. Sekiranya satu kesalahan mengakibatkan pembunuhan tanpa niat, yang lain mengakibatkan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang. Pertimbangan yang berbeza digunakan untuk setiap kesalahan. Mahkamah harus memberi tumpuan kepada keseluruhan keterangan untuk menentukan cabang mana di bawah s 299 yang menjadikan tertuduh bersalah. Apa-apa perbincangan yang berkaitan dengan elemen s 300(d) di Mahkamah Tinggi dan Mahkamah Rayuan tidak lagi relevan untuk proses menentukan kesalahan di bawah s 299 KK untuk kesalahan membunuh tanpa niat. Panel MP sebelum ini mendapati bahawa s 304(a) adalah hukuman yang sesuai. Apa yang dilakukan oleh panel terdahulu adalah sempurna dan merupakan sesuatu yang MP berhak melakukan dalam semua rayuan jenayah yang dikemukakan di hadapannya (lihat perenggan 21–24).

(4) Sekalipun panel MP sebelum ini telah salah menggunakan fakta-fakta kepada undang-undang, itu tidak memenuhi ambang untuk memerintahkan suatu kajian semula di bawah k 137. Undang-undang itu jelas. Jika keputusan dicabar berdasarkan meritnya, sama ada atas fakta atau undang-undang, atau jika terdapat perbezaan pandangan yang timbul daripada pemakaian satu set fakta dengan peruntukan undang-undang, MP tidak akan melaksanakan kuasa semakannya. Kuasa untuk membuat semakan hanya boleh dilaksanakan dalam keadaan terhad (lihat perenggan 25).

(5) Pemohon-pemohon dihukum penjara 20 tahun dan bukan diberikan hukuman mati. Memandangkan layanan kejam mereka terhadap pembantu mereka sehingga menyebabkan kematiannya yang tidak diduga dan tragis, mana-mana tribunal munasabah akan mendapati hukuman itu sesuai kerana ia mencerminkan keseriusan kesalahan itu.

Pemohon-pemohon telah mendapat manfaat didengar pada tiga peringkat mahkamah dan telah diwakili secara sah sepanjang prosiding, oleh itu tidak boleh dikatakan, atas nama keadilan, bahawa terdapat salah laksana keadilan (lihat perenggan 27).

(6) Panel MP sebelumnya tidak melakukan kekhilafan. Sebaliknya, kekhilafan itu terletak pada pemohon kerana melihat kaitan antara ss 304 dan 300 KK apabila kaitan sebenarnya adalah antara ss 304 dan 299. Seksyen 304 tidak ada kaitan dengan s 300 tetapi semua yang perlu dilakukan dengan s 299. Bahasa yang digunakan oleh penggubal di s 299 KK tidak boleh menjadi lebih jelas dari segi menetapkan kesalahan yang telah diperdatakan untuk memberikan hukuman (lihat perenggan 28).

(7) Setiap keputusan mahkamah banyak bergantung pada keunikan setiap kes kerana fakta akan berbeza dan tertakluk kepada kesimpulan yang berbeza yang membawa kepada pendapat yang berbeza dari mahkamah. Sekalipun fakta itu sama, MP berhak membuat penemuan baru fakta dalam proses penemuan bersalah. MP tidak terikat dengan keputusannya yang terdahulu, terutamanya apabila rayuan adalah berkaitan penemuan fakta (lihat perenggan 26).]

Notes

For cases on conviction on lesser charge, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2078–2080.

Cases referred to

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351; [2013] 4 CLJ 901, FC (refd)

Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd [2019] 2 MLJ 609, FC (refd)

Rupa Ashok Hurra v Ashok Hurra and another LNIND 2002 SC 273; (2002) 4 Supreme Court Cases 388, SC (refd)

Soh Chew Thong & Anor v PP (unreported), FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 86
Federal Constitution arts 5, 8
Penal Code ss 34, 299, 300, 300(d), 302, 304, 304(a), (b)
Rules of the Federal Court 1995 r 137

Gopal Sri Ram (Hisyam Teh Poh Teik and Guok Ngek Seong with him) for the applicants.
Roslan Mat Nor (Tetralina bt Ahmad Fauzi with him) for the respondent.

David Wong CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] The applicants made this application under r 137 of the Rules of the Federal Court 1995 ('r 137') to review and set aside the conviction and sentence under s 304(a) of the Penal Code ('the Code') handed down by an earlier panel of the Federal Court on 4 April 2018 ('earlier panel'). Alternatively, the applicants are seeking for the case to be reheard before the Federal Court.

[2] The applicants' premise is that the earlier panel had caused a miscarriage of justice when they set aside the conviction and sentence under s 302 of the Code and substituted it with a conviction and sentence under s 304(a) of the Code instead of under s 304(b) of the same.

[3] We heard the appeal on 16 May 2019 and reserved judgment. We have carefully reconsidered submissions of respective counsel and we now deliver our decision and grounds.

THE BACKGROUND FACTS

[4] The salient facts are these. The applicants were jointly charged for murder under s 302 of the Code before the High Court at Shah Alam for the murder of their maid through long period of abuse, neglect and starvation. They were both convicted and sentenced to death by the High Court.

[5] The applicants subsequently appealed to the Court of Appeal against the conviction which was heard and dismissed by the Court of Appeal. The Court of Appeal maintained both the conviction for murder and the death sentence.

[6] Aggrieved by the Court of Appeal's decision, the applicants appealed to the Federal Court. On 4 April 2018 the earlier panel set aside the conviction under s 302 of the Code and substituted it with a conviction under s 304(a) of the Code. The applicants were then sentenced to 20 years imprisonment.

[7] This takes us to the present notice of motion (the application) for the review of the said decision made by the earlier panel that was heard by us on 16 May 2019.

A THE APPLICANTS' POSITION

[8] The contention as we understand it is this. The applicants were charged under s 302 of the Code read together with s 34 of the same. In proving its case, the prosecution had relied on s 300(d) which reads as follows:

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> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

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[9] That reliance was made clear in the opening statement of the prosecution and the learned High Court judge had also treated the case in similar manner as can be seen in the following paragraph:

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> To rely on section 300(d) of the Penal Code, it is incumbent upon the prosecution to prove the following elements —
>
> 1) The victim ie Isti Komariyah had died (element 1).
>
> E 2) The death of Isti Komariyah is the result of the actions of Accused 1 and 2 in not —
>
> (a) providing food to the deceased; and
>
> (b) providing medical treatment to the deceased (element 2); and
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> F 3) The actions were done without excuse (element 3).

[10] In regard to element 3, the learned judge said this:

> From the injuries suffered by the deceased and also her physic from 49 kilogram to 25 kilogram and the fact that no medical attention was given which should have been done by a reasonable person especially the two Accused, Accused 1 as an employer and Accused 2 as the wife of an employer can be summed up as having the intention to just let whatever happened.
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> The photographs P5 (5–14) show the deceased had external injuries which the Autopsy Report stated as totalling 39. The Report further stated that multiple blunt impacts is one of the causes of the death.
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> The external injuries in the deceased is consistent with being beaten and SP13, the son of both Accused stated in evidence that 'sometimes they beat her with a balloon stick, I see my mum was beaten her with the yellow balloon stick'.
>
> I If both the Accused had acted as reasonable employer and wife of an employer, with all the marks of the body they should have provided her medical attention.

[11] The analysis of the facts by the learned High Court judge was accepted by the Court of Appeal.

[12] The earlier panel, however, took a different view of the factual matrix and found that a case under s 300(d) of the Code had not been made out against the applicants. However, the earlier panel found the applicants guilty of culpable homicide and sentenced both of them under s 304(a) of the Code. This lies, as submitted by learned counsel, the crucial and fatal mistake committed by the earlier panel which had caused an in justice to the applicants.

[13] The mistake was this. When the earlier panel found that s 300(d) was not proved, the applicants cannot be found guilty of culpable homicide under s 304(a) which speaks of intention and not 'knowledge' as required in s 300(d). The correct provision under which the applicants should be found guilty of was simply s 304(b) which also speaks of 'knowledge' as is provided for in s 300(d). And since the whole foundation of the prosecution's case and the rationale of both the High Court and Court of Appeal were premised on 'knowledge' pursuant to s 300(d), the earlier panel in reducing the charge against the applicants can only consider a substitution of conviction and sentence under s 304(b) and not s 304(a).

[14] Learned counsel referred us to this court's decision in the appeal of *Soh Chew Thong & Anor v Public Prosecutor* (grounds not available) in which the facts, according to learned counsel, are similar with the present case. In that case, the prosecution had relied on s 300(d) of the Code as was done here, but when the Federal Court decided to reduce the charge, they substituted the conviction and sentence under s 302 with s 304(b) of the Code. Premised on that decision, learned counsel submits that the applicants must be treated equally as required under the law (arts 5 and 8 of the Federal Constitution) and the applicants' conviction and sentence must therefore be substituted with a conviction and sentence s 304(b) of the Code.

[15] In view of the above, learned counsel submitted that we should exercise our power of review under r 137 to correct this apparent in justice. Reliance is made on the case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351; [2013] 4 CLJ 901 where the Federal Court held as follows:

> [10] Following the above authorities, we are of the considered view that the inherent power of the court to review its decision as declared in r 137 is a necessary power which is inbuilt or intrinsic in the court, as the court of justice. This power may be equated to the powers of the courts to dismiss an action for want of prosecution or to the power of court to strike out any pleading or indorsement of any writ in the action under the Rules of Court 2012. This inherent power is derived from the inherent jurisdiction of the court which is to do justice and to prevent any abuse of process. This power springs not from legislation but from the nature and constitution of the court as a dispenser of justice. And this inherent power can only be taken away by express provision in any written law.

A [11] The inherent power may be described as the power which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence. (See P Ramanatha Aiyar, *The Law Lexicon*, 2nd Ed, Reprint 2010). The rationale behind this inherent power is to safeguard the integrity of earlier litigation process and the correction of
B in justice.

[16] Learned counsel also refers to the Indian case of *Rupa Ashok Hurra v Ashok Hurra and another* LNIND 2002 SC 273; (2002) 4 Supreme Court Cases 388 where the court said:

C 47. The concern of this Court rendering justice in a cause is not less important than the principle of finality of its Judgment. We are faced with competing principles — ensuring certainty and finality of a Judgment of the Court of last resort and dispensing justice on reconsideration of a Judgment on the ground that it is vitiated being in violation of the principle of natural justice or giving scope for apprehension
D of bias due to a Judge who participated in the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the Court. Such a Judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice — a concept which is not dispute but a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility,
E yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final Judgment to set right miscarriage of justice complained of. In such a case it would only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question, we are persuaded that the duty to do justice in these rarest of rare cases shall have to prevail
F over the policy of certainty of justice as though it is essentially in the public interest that a final Judgment of the final Court in the country should not be open to declining to reconsider the Judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable in justice.

G OUR DECISION

[17] In determining this application, the primary question we ask ourselves is simply this. Has the earlier panel's decision in convicting and sentencing the applicants under s 304(a), after having found that a case under s 300(d) had not
H been made out, contrary to any law so as to render it an illegal decision requiring the court to exercise its power of review under r 137?

[18] Our starting point of deliberation is to look at the jurisdiction or power of this court in an appeal. The relevant provision of law is s 86 of the Courts of
I Judicature Act 1964 ('the CJA') which reads:

Save as this Act provided, in the exercise of its appellate jurisdiction, the Federal Court shall have the same jurisdiction, may exercise the same powers and may make any order as are had and may be exercised or made by the Court of Appeal or by the High Court.

[19] Section 86 of the CJA is quite clear in that in criminal appeals, we possess the same powers as the High Court and Court of Appeal. What that simply means is that, we are duty bound (as in all criminal appeals) to evaluate the facts in its totality and then make a determination as to whether the conviction is safe. If we find that the conviction is unsafe, we are then duty bound to make a determination whether the evaluated facts justify a conviction under another provision of the Code, to wit, another criminal offence.

[20] Though there are no written grounds by the earlier panel, there is little doubt as to what the earlier panel did. Upon finding that s 300(d) had not been proved, the earlier panel, as intimated by us earlier, then embarked on a process of re-evaluation of the facts and made a determination on which relevant provision under the Code were the applicants guilty of, upon the application of the fresh finding of facts.

[21] It cannot be disputed that in a circumstance where someone had been unlawfully killed, ss 299 and 300 of the Code come into play. And consequently, when a court finds that a s 300 offence (murder) has not been made out, s 299 (culpable homicide) offences come into play (unless on the facts neither offence has been made out in which case there will be an outright acquitted) for the court to determine, based on the facts found, under which limb of s 299 do the acts and omissions fall under.

Section 299 consists of three limbs:

(1) with the intention of causing death;

(2) with the intention of causing bodily injury as is likely to cause death; or

(3) with knowledge that he is likely by such act to cause death.

[22] That was what the earlier panel did. They evaluated the evidence again as they are empowered to do so under s 86 of the CJA, in order to find guilt either under limb 1 or 2 or 3 of s 299. If it is an offence under limb 1 or 2, then it would draw punishment under s 304(a) of the Code. If it is a limb 3 offence, then it would draw punishment under s 304(b) of the Code. For clarity, we reproduce s 304 below:

> 304 Punishment for culpable homicide not amounting to murder
>
> Whoever commits culpable homicide not amounting to murder shall be punished —
>
> (a) with imprisonment for a term which may extend *thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or

(b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[23] Not only was the earlier panel fully entitled to revaluate the evidence afresh, it must adopt this approach for the simple reason that the ingredients set out in ss 299 and 300 of the Code vary in degree. One results in culpable homicide while the other is culpable homicide amounting to murder. Different considerations apply to each offence. The court's mind must then focus on the totality of the evidence to determine which limb in s 299 could the accused be found guilty of. Whatever discussions relating to the ingredients of s 300(d) in the High Court and Court of Appeal are no longer of relevance in the process of determining guilt under s 299 of the Code for culpable homicide. Here, the earlier panel eventually found that a s 304(a) conviction is an appropriate sentence.

[24] In our minds, what the earlier panel did was perfectly in order and this court is entitled to do so in all criminal appeals brought before this court.

[25] Even if one takes the applicants' contention to their highest, that is, the earlier panel had wrongly applied the facts to the law, that does not meet threshold to order a review under r 137. The law is clear. When there is a challenge on a decision premised on its merits whether on facts or law or where there is a divergent of opinions arising from application of a set of facts to a provision of law, this court would not exercise its power of revision. For this court to exercise its power to review, it can only be done under limited circumstances and they are listed in the recent judgment of this court in *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd* [2019] 2 MLJ 609, as per the followings:

> [51] To exercise its inherent power under r 137 to review its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances. In *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351; [2013] 4 CLJ 901, Arifin Zakaria CJ adopting the relevant passage in Abdul Hamid CJ's judgment in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia Bhd)* [2008] MLJU 251, said:
>
> > [15] ... this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same. We could not express this better than by adopting the words of Abdul Hamid CJ in *Asean Securities* which reads:
> >
> > > [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no

circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken upon another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts (see: *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd Ors* [1986] 1 MLJ 166; *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; *Allied Capital Sdn Bhd v Mohd Latiff Bin Shah Mohd & Another Application* [2005] 3 MLJ 1, in particular the dissenting judgment of Abdul Hamid Mohamad FCJ; *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 MLJ 474; *Chan Yock Cher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 CLJ 29; and *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201.)

[5] Coming back to r 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul bin Ghaffar Md Amin v Ibrahim Yusoff & Anor* [2008] 3 MLJ 771 and in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753. In the former case I concluded:

In other words, rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spell out under the Federal Constitution, the Courts of Judicature Act and other statutes.

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused ...

In short, in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal.

[52] In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 1090, Zaki Tun Azmi PCA (later CJ) said:

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent in justice or an abuse of the process of the court. It has that

very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant in justice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[40] Some of the circumstances in which this discretion should be exercised or not, are as follows:

(a) that there was a lack of quorum eg the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1);

(b) the applicant had been denied the right to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385);

(c) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673);

(d) where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd and another application* [2005] 3 MLJ 1);

(e) clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417);

(f) it does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101);

(g) where an applicant under r 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand v Sukhraj Rai* [AIR] 1941);

(h) where bias had been established (*Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353);

(i) where it is demonstrated that the integrity of its earlier decision had been critically undermined eg where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin* [2005] 3 All ER 550);

(j) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485).

[26] The case of *Soh Chew Thong & Anor v Public Prosecutor* was relied on heavily by the learned counsel for the applicants. We do not have the benefit of the grounds but it must be remembered that every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts. Even if the facts are the same, this court is entitled to make a fresh finding of fact in a guilt finding process. Further, this court is not bound by its own earlier decision especially when the appeal relates to finding of facts.

CONCLUSION

[27] The applicants had been sentenced to 20 years imprisonment instead of a death sentence. Taking into consideration of the cruel treatment by one human being to another which eventually led to an untimely and tragic death of the latter, any reasonable tribunal would find the aforesaid imposed sentence to be appropriate as it reflected squarely on the seriousness of the offence. Both applicants had the benefit of three court hearings and legal representations hence one cannot say in fairness that there has been a miscarriage of justice.

[28] In sum, there was no error on the part of the earlier panel. Rather, the error lies on the part of the applicants who saw the nexus as between s 304 of the Code and s 300 of the Code, when in fact, the true nexus only exists between s 304 of the Code and s 299 of the Code. The language employed by the drafters in s 299 of the Code cannot be clearer in terms of stipulating which offence it has been legislated to provide punishments for. To our minds, as alluded to in the preceding paragraphs above, s 304 of the Code has nothing to do with s 300 of the Code. It has everything to do with s 299 of the Code.

[29] Accordingly, we dismiss the motion to review by the applicants.

Review application dismissed.

Reported by Ashok Kumar